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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-610

NORTHEAST MARINE EXECUTIVE COUNCIL,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
DELTA AIR LINES, INC.,
DELTA MASTER EXECUTIVE COUNCIL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CIVIL AERONAUTICS BOARD,
AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
DELTA AIR LINES, INC.,
DELTA MASTER EXECUTIVE COUNCIL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Northeast Master Executive Council, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 19, 1974.

OPINION BELOW

The Opinion of the Court of Appeals, not yet reported, appears annexed hereto as Appendix A. The Order of the Civil Aeronautics Board, 73-1-24, dated January 10, 1973 is not reported, but appears as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 19, 1974. In a letter dated November 1, 1974 counsel was informed by the Clerk of that Court that there were insufficient votes on a timely-filed petition for a rehearing *en banc*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Civil Aeronautics Board should exercise its reserved jurisdiction and order arbitration of a disputed merged seniority list that was uniformly repudiated by the rank and file pilot members of the absorbed airline and which systematically favors those of the surviving carrier, after negotiations leading up to promulgation of the list were hidebound by secrecy.

STATEMENT OF THE CASE

After the Civil Aeronautics Board approved the merger of Delta Air Lines, Inc. (Delta) and Northeast Airlines, Inc. (Northeast), the respective Master Executive Council of the airlines selected two merger representatives each to represent them in the negotiations for a single, integrated seniority list. According to the Air Line Pilots Association Policy Manual, these representatives were to arrive at a merged seniority list "on the basis of problems and factors peculiar to the

merger, using length of service as a primary guide or reference point without disturbing any individual's relative position on his seniority list". [Appendix A, page 15a]. Mindful of the fact that equipment restrictions necessarily would be superimposed on any negotiated seniority list, the Northeast MEC instructed their representatives to obtain an integrated list in which length of service was in the forefront of consideration.

On June 19, 1972 the Northeast MEC was informed for the first time that an agreement had been reached on a merged seniority list eighteen days earlier. This agreement was the outgrowth of a previously undisclosed Memorandum of Understanding signed by the merger representatives almost four months before and witnessed by the Chairman of the Board and Chief Executive Officer of Delta and by a member of the ALPA Merger Policy Committee. The list itself advances seventy-one numbers before designating the first Northeast pilot and then places eleven percent of the Northeast pilots at the end.[1] The interstice is grouped in such a way that, with the exception of one pilot from each airline, all Delta pilots and not one Northeast pilot will reach the eventual seniority he would have had absent a merger. The cumulative effect of such a list, coupled with equipment restrictions, meant that none of the Northeast pilots would be able to participate in flying larger aircraft and in the emoluments that go with such an opportunity. The Northeast MEC voted to repudiate the list and to request ALPA to institute arbitration proceedings to settle this seniority dispute. ALPA refused this request of

[1] At the time of the merger there were 2,232 Delta flight deck officers and 551 Northeast flight deck officers.

its members on the grounds that the Association's merger procedures had been followed and that it was within the complete and full authority of the merger representatives, not the MEC, to compile the integrated list. ALPA forwarded the list to Delta for its adoption.

As a result, the Northeast MEC sought to invoke the jurisdiction of the Civil Aeronautics Board, reserved by its Order authorizing the merger " '. . . to make such amendments, modifications, and additions to the labor protective conditions . . . as circumstances may require'," [Appendix B, page 2]. On January 10, 1973 the Civil Aeronautics Board dismissed the Petition for the exercise of reserved jurisdiction, without oral argument, stating that, in the absence of bad faith, the adoption of an integrated list through negotiation, itself, constitutes "provisions . . . for the integration of seniority lists in a fair and equitable manner within the meaning of section 3 of the Board's labor protective provisions." Finally, the Board voiced reluctance to pass on matters of "internal union procedure". [Appendix B, page 27].

The Court of Appeals affirmed the Order of the Civil Aeronautics Board dismissing the petition. While recognizing that the problem of seniority integration has no facile solution the Court nonetheless reasoned that the procedures of the ALPA Policy Manual had been followed by the merger representatives and that, therefore, this can be best described as a "negotiated result" with which the Board traditionally has been reluctant to interfere. The Court considered insignificant that the MEC repudiated the integrated seniority list since "the ALPA policy in effect during the ne-

gotiations at issue in this case did not require (nor provide for) such MEC approval; the merger representatives were vested with complete and full authority". [Appendix A, page 12a]. Finally, the Court below reasoned that the integrated seniority list was substantively fair and equitable since significant factors, other than length of service, could reasonably be considered. Such factors included complicated equipment differences between the airlines, route structure variations, and the prospects of Northeast pilots continuing in what was considered by the Court to be a "failing airline". [Appendix A, page 13a].

REASONS FOR GRANTING THE WRIT

This case and the decision of the District of Columbia Circuit below present important questions concerning the scope of the Civil Aeronautics Board's authority to rectify an unfair and inequitable seniority list even though, technically, it is the product of a negotiated result. At a time when airline mergers are in the offing and the Civil Aeronautics Board will be asked to provide relief from industry-imposed seniority placement, labor, management, and the Board will benefit from the guidelines established by this Court in defining the scope of the CAB's reserved jurisdiction. The need for this Court's intervention becomes even more compelling in those cases where the collective bargaining representative, management, and an industry-regulating agency of the federal government sometimes syncretize their functions, leaving the rank and file employee to thresh and hew his way through intra-union procedures that mean less in actual practice than they do in principle.

1. One of the problems created by this case, still unresolved, is whether or not union procedures that effectively undermine participation by rank and file members in seniority integration can be challenged before the Board in the exercise of its reserved jurisdiction when the chosen representatives of the employees are grossly indifferent, and even hostile, to the interests they have been appointed to protect. The principle of "fair representation" is well recognized in the court insofar as it applies to the duty of an exclusive bargaining representative to honestly serve the interests of its members. See *Ford Motor Co.* v. *Huffman*, 345 U.S. 330. No less should be expected of those representatives who are chosen from the ranks of employees at a different level in labor negotiations. Here, the merger representatives became abdicants to whatever forces caused them to approve for 549 others a list that was born in secrecy and that systematically excluded almost all Northeast pilots from realizing their full employment potential.

In support of its conclusion that the petitioners "failed to demonstrate any irregularity in the ALPA procedures" [Appendix A, page 12a], the District of Columbia Circuit held in effect that the protest of the Northeast MEC was irrelevant since "[o]nly ALPA was authorized to negotiate a bargaining agreement with the surviving carrier". [Appendix A, ibid.], This interpretation conflicts, in principle, with the rationale of the Second Circuit in *American Airlines* v. *CAB*, 445 F.2d 891 (2d Cir. 1971), cert. den. 404 U.S. 1015 (1972) in which the Allied Pilots Association was the exclusive bargaining agent with the surviving carrier, yet the court accepted as the general rule the Board's determinaton "that arbitration was

the appropriate method of integrating seniority lists . . ." 445 F.2d at 896. There the TCA MEC objected to the proposal for seniority integration and the Board ordered arbitration. Traditionally, seniority integration has been considered sufficiently important to the future of airline pilots as to warrant the full protection of due process of law and fundamental fairness. For example, see *Outland* v. *CAB*, 284 F.2d (D.C.Cir. 1960) wherein the disputed seniority list was submitted to the respective airlines' MEC membership for their approval and, in addition, individual protests from the pilots were reviewed by a Seniority Board.

2. Seniority is a true asset to an employee and it is the only means by which professionals in large organizations, particularly airline pilots, can achieve the full benefits of their labor. In determining a pilot's proper seniority number, length of service has been the fountainhead of every merger since 1944. To the extent that other factors, including route structures and differences in equipment, directly affect a pilot's employment opportunity only underscores the problem caused when these, coupled with the economics of a "failing airline", become the benchmark for placement on a seniority list. The pilot is made a pawn to those who can jockey his seniority according to the dictates of a multitude of factors that, in the final analysis, bear no relationship to length of service. When equipment restrictions are added to this mulligan's list of "problems and factors" length of service becomes obscured as a primary guide.

The Court below has encouraged this redoubling effect in its determination that such considerations as "past hiring practices and relative prospect for continued employment and advancement at Delta and

Northeast" [Appendix A, page 13a] are significant factors to be considered in addition to length of service, equipment size and route structures. The correctness of this decision, assuming the propriety of using other factors, is open to serious question when length of service fades proportionately, as it will, from the proscenium of consideration. The concept that an integrated list must be based "not on grounds totally irrelevant to seniority" suffers fundamental erosion unless this Court acts to examine the effects of the decision below upon intra-union due process and an employee's stake in the utilization of length of service. *See Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127, 1131 (C.A. 6th, 1973).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1595

NORTHEAST MASTER EXECUTIVE COUNCIL, PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

AIR LINE PILOTS ASSOCIATION INTERNATONAL
DELTA AIR LINES, INC.
DELTA MASTER EXECUTIVE COUNCIL, INTERVENORS

Petition for Review of an Order of the
Civil Aeronautics Board

Argued 18 April 1974

Decided 19 August 1974

Walter J. Smith, Jr., with whom *J. Gordon Forester Jr.* and *Robert S. Perkins* were on the brief, for petitioner.

Joan Marie Frankel, Attorney, Civil Aeronautics Board, with whom *Richard Littell*, General Counsel, *O. D. Ozment*, Deputy General Counsel, *Robert L. Toomey*, Assistant Chief, Litigation and Research, Civil Aeronautics Board and *Carl D. Lawson*, Attorney, Department of Justice were on the brief, for respondent.

Frank F. Rox and *Robert Reed Gray* were on the brief for intervenor Delta Air Lines, Inc.

Gary Green was on the brief for intervenor Air Line Pilots Association, International.

W. D. Deakins, Jr., and *Richard F. Watt*, were on the brief for intervenor Delta Master Executive Council.

Before: EDWARDS,* *United States Circuit Judge* for the Sixth Circuit, TAMM and WILKEY, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge:* This case comes to us on petition for review of a Civil Aeronautics Board order arising out of the merger between Delta Air Lines, Inc., and Northeast Airlines, Inc., brought by the Northeast Master Executive Council, representing the flight deck officers (pilots and navigators) formerly employed by Northeast and since the merger employed by Delta. Following the merger, the Master Executive Council filed a petition with the Board challenging the integrated seniority list of pilots of Delta, the merged surviving airline. The Board's order [1] dismissing this petition and a subsequent petition for reconsideration is the subject of our review. Finding no error in the Board's proceedings, we decline to vacate its order.

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* Sitting by designation pursuant to 28 U.S.C. § 291(a).

[1] Order No. 73-1-24 (dismissing Petition for Exercise of Reserved Jurisdiction) and Order No. 73-4-18 (denying Petition for Reconsideration).

I. Proceedings Before the Board and the United States District Court

A. *Background*

On 24 April 1972 the Civil Aeronautics Board approved[2] a merger between Delta Air Lines, Inc., and Northeast Airlines, Inc., subject to certain "labor protective provisions" imposed by the Board for the protection of the employees of both companies who might be adversely affected by the merger.[3] In addition the Board reserved jurisdiction "to make such amendments, modifications, and additions to the labor protective conditions . . . as the circumstances may require. . . ."[4]

At all pertinent times the Air Line Pilots Association ("ALPA") was the certified bargaining representative for employees of both airlines. Pursuant to ALPA's internal procedure for seniority integration,[5] the Master Executive Councils ("MEC's")[6] of Delta and Northeast each designated two merger representatives for the pur-

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[2] Orders Nos. 72-5-73 and 72-5-74, Docket 23315. The orders were served 19 May 1972.

[3] Specifically, section 3 of those provisions directed in relevant part that

> provisions shall be made for the integration of [the previously separate Delta and Northeast] seniority lists *in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected.* (Emphasis added.)

Joint Appendix [hereafter App.] at 6.

[4] App. at 5.

[5] *See* note 22 *infra.*

[6] ALPA's constitution and by-laws establish a "Master Executive Council" as the administrative arm at each airline whose flight deck officers are represented by ALPA. Each ALPA flight deck officer group elects its own MEC on an airline-by-airline basis. App. at 174.

pose of arriving at a single integrated seniority list. When on 5 June 1972 the negotiations culminated in agreement between the merger representatives, ALPA transmitted the list for acceptance by Delta, the surviving airline. By agreement of 26 October 1972 Delta agreed to modify its existing collective bargaining agreement with ALPA so as to implement the new list.

Shortly after its publication, however, the Northeast MEC sought to repudiate the list. ALPA president O'Donnell declined pleas to reject the list and explained that since the merger representatives, not the MEC's, had been delegated complete authority under ALPA merger policy to compile a merged list, no authority existed in either MEC to alter its terms once the merger representatives reached an accord.

B. *Proceedings in District Court*

The disgruntled Northeast pilots filed three separate actions in District Court in an effort to set aside the integrated list. In *Northeast Pilots Master Executive Council* v. *O'Donnell and ALPA*,[7] the Northeast MEC sought "on its own behalf and on behalf of more than 540 pilots which it represents" to enjoin ALPA from executing an agreement with Delta incorporating or acknowledging the integrated seniority list. The pilots' central argument was that the merger representatives had exceeded the scope of their authority and that the resulting agreement was violative of the Railway Labor Act[8] "in that it purports to eliminate the right of any aggrieved pilot or group of pilots to petition for a hearing before the System Board of Adjustment as provided by 45 U.S.C.A. sec. 184." Citing *Hyland* v. *United Air Lines, Inc.*,[9] the District Court dismissed the action, holding that

[7] Civil No. 1911-72 (D.D.C., 4 October 1972).

[8] 45 U.S.C. § 151 *et seq.*

[9] 254 F. Supp. 367 (N.D. Ill. 1966).

exclusive jurisdiction over the controversy lay with the Civil Aeronautics Board. No appeal was taken.

A second suit, *W. Peter Carey, et al.* v. *J. J. O'Donnell and ALPA*,[10] was filed in District Court on 2 April 1973 by five named plaintiffs "on their own behalf and on behalf of more than 540 former Northeast pilots who are now employed by Delta Air Lines, Inc." Again the District Court held that the Board had exclusive jurisdiction and dismissed the action.

A third action, *George S. Chaudoin, et al.* v. *ALPA and Delta Air Lines, Inc.*,[11] filed 19 April 1973 as a class action on behalf of former employees of Northeast Airlines, Inc., was dismissed as barred by *res judicata* and collateral estoppel.

The *Carey* and *Chaudoin* dismissals were appealed to this court, were consolidated for our consideration, and are treated together in the appended opinion of this date.

C. *Proceedings Before the Civil Aeronautics Board*

On 4 October 1972, after unsuccessful efforts in District Court, the Northeast MEC filed with the Board a Petition for the Exercise of Reserved Jurisdiction. The MEC alleged that the "540 flight deck officers represented by NE MEC will soon have imposed upon them an integrated seniority list that is not fair and equitable." The Board dismissed the petition:

> In sum, it has been, and continues to be, our view that absent a showing of bad faith, the adoption by a carrier of an integrated seniority list proposed by the collective bargaining representatives of the employees involved amounts to the carrier having made "provisions . . . for the integration of seniority lists

[10] Civil No. 609-73.

[11] Civil No. 752-73.

in a fair and equitable manner" within the meaning of section 3 of the Board's labor protective provisions. [12]

Northeast MEC filed the instant petition to review the Board's order.

II. The Board's Responsibility

Jurisdiction of the Civil Aeronautics Board over matters of airline merger, including the fair and equitable integration of seniority lists, is well established. [13] We recognized in another context the Board's "broad authority to approve airline mergers consistent with the public interest." [14] If, as we hold today in the companion cases, [15] the Board is vested with exclusive jurisdiction over these matters, we must insure by our direct review [16] that that jurisdiction is exercised in a manner that vindicates the policies underlying this and other arguably pertinent statutory provisions. [17]

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[12] App. at 178.

[13] *Outland* v. *CAB*, 109 U.S.App.D.C. 90, 284 F.2d 224 (1960); *Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973); *American Airlines, Inc.* v. *CAB*, 445 F.2d 891 (2nd Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972); *Oling* v. *Air Line Pilots Ass'n*, 346 F.2d 270 (7th Cir. 1965), *cert. denied*, 382 U.S. 926 (1965); *Kent* v. *CAB*, 204 F.2d 263 (2nd Cir. 1953), *cert. denied*, 346 U.S. 826 (1953).

[14] *Air Line Employees Ass'n* v. *CAB*, 134 U.S.App.D.C. 185, 186, 413 F.2d 1092, 1093 (1969).

[15] *W. Peter Carey, et al.* v. *J. J. O'Donnell, et al.*, No. 73-1608; *George S. Chaudoin, et al.* v. *Air Line Pilots Association, et al.*, No. 73-1783.

[16] *See* 49 U.S.C. § 1486.

[17] The causes of action under *Carey* and *Chaudoin* were asserted to arise under the Railway Labor Act [45 U.S.C. § 151 *et seq.*] and the Age Discrimination in Employment Act of 1967 [29 U.S.C. § 621 *et seq.*], respectively.

Consequently, the Board is charged with the ultimate responsibility of insuring that a fair, just, and equitable solution is reached with respect to the integration of seniority lists as well as all other aspects of the merger it approves. To the extent that the Board relies upon negotiations among the parties most vitally interested, *i.e.*, the pilots, this is recognition of a practical means to reach a result meeting the statutory standard, but delegation cannot relieve the Board of its statutorily imposed ultimate responsibility. Hence we would not hesitate to reverse if we were not satisfied that the Board had discharged this responsibility faithfully. However, on the record before us we conclude that the action below must be affirmed.

III. The ALPA Procedures Employed

Faced with the difficulties inherent in the fair and equitable resolution of seniority problems, and recognizing that such problems lend themselves readily to solution by negotiation and voluntary agreement, the Board in the *Monarch-Challenger Merger Case* [18] established the policy of noninterference with private negotiations between affected pilot groups on matters of seniority integration. Although the Board was later forced to decide such questions itself in the *North Atlantic Route Transfer Case,* [19] it later warned that its action there was "not to be construed as any departure from the declaration first made . . . in [*Monarch-Challenger*] that the integration of seniority of employees of merging operations should, if possible, be left to voluntary agreement . . . ." [20] Thereafter, the Board has consistently adhered to the *Monarch-Chal-*

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[18] 11 C.A.B. 33 (1949).

[19] 12 C.A.B. 124 (1950). The parties could not reach a voluntary agreement and refused to arbitrate.

[20] 14 C.A.B. 910, 914 (1951).

lenger policy.[21] In view of the many considerations necessarily involved in the assimilation of a fair and equitable integrated seniority list, we recognize the wisdom on several practical grounds of leaving such considerations to the employees' freely chosen representatives for original negotiation.

In the instant case negotiations between the Delta pilots and the incoming Northeast pilots were governed by ALPA's Merger Policy.[22] Under this procedure, when the president of ALPA believes a merger to be imminent, he notifies the affected MEC's and directs them to meet and to activate ALPA Merger Policy and Procedures. The president then determines by ballot among the affected flight deck operating crew members their choice between two methods for compilation of a merged seniority list. Method # 1 provides for a list compiled "solely on the basis of length of service," while Method #2 takes into account "problems and factors peculiar to the merger, using length of service as a primary guide or reference point . . . ."[23] The majority of votes cast for either method governs for each respective airline, but where different airline pilot groups have elected dissimilar methods, the list is compiled in accordance with Method #2. Method #2 was decreed in the instant case because the two pilot groups split, Northeast pilots preferring #1 and Delta pilots opting for #2.

Continuing with the prescribed procedure, MEC-appointed committees compute current seniority lists for each airline and entertain challenges thereto. Within 10

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[21] *See, e.g., Braniff-Mid-Continental Merger Case*, 15 C.A.B. 708 (1952); *Delta-Chicago and Southern Merger Case*, 16 C.A.B. 647 (1952); *Flying Tiger-Slick Merger Case*, 18 C.A.B. 326 (1954).

[22] SECTION XII, MERGERS, INTERCHANGE PROTECTIVE PROVISIONS, *see* APPENDIX A.

[23] SECTION XII, *1*(b).

days after Board approval of the merger, each MEC meets and elects two representatives vested with plenary authority to act for their respective flight deck crew members.[24] The merger representatives then "by direct negotiation reconcile all their differences as to method of integration and compile the single acceptable flight deck operating crew member seniority list."[25] Although progress reports are to be made every five days to the president of ALPA,[26] no provision exists for apprising the respective MEC's of the progress of negotiations. If no agreement is reached within 75 days of Board approval of the merger, the matter is submitted to arbitration for final resolution.

Conceding that its attack on the integrated list concerns "procedural irregularities that fall short of directly violating . . . ALPA Merger Policy,"[27] petitioner first contends that "the certified representatives of the Northeast pilots kept the details of the negotiations leading up to the merged list a secret from the pilots they represent, even after the agreement had been signed."[28] Of course, the very nature of such negotiations requires that they be attended by a certain degree of confidentiality. More significantly, however, the merger representatives were freely chosen by the respective MEC's, who ostensibly could

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[24] SECTION *III*(a) provides in relevant part:

> The Master Executive Councils will certify these representatives as having complete and full authority to act for and in behalf of the flight deck operating crew members of their respective air line for the purpose of compiling a single flight deck operating crew member seniority list.

[25] SECTION XII, *III*(e).

[26] SECTION XII, *III*(e).

[27] Petitioner's Brief at 11.

[28] *Id.* at 8.

have revoked their authority at any time.[29] Moreover, petitioner concedes that it was ware as early as 28 January 1972 that the merger representatives would not reveal any details of the negotiations. Yet the negotiations continued until formal execution of the agreement on 1 June 1972, and it was not until 26 days later that petitioner met in special session to "repudiate" the merged list. In list of these factors, coupled with petitioner's failure to allege bad faith on the part of the merger representatives, we are not convinced that the secret nature of the negotiations inhibited the compilation of a fair and equitable list.

Petitioner next argues that by failing to follow its instructions to seek a merged list *based solely upon length of service,* the merger representative exceeded the scope of their authority.[30] But the simple answer to this is that ALPA merger policy on the method to be used is to the contrary, and there was nothing that either the merger representatives or the MEC could have done to change it. The merger policy not only provides that the MEC's "will certify these representatives as having *complete and full authority* to act for and in behalf of the flight deck operating crew members,"[31] thus proscribing any attempt by

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[29] *See* Letter from J. J. O'Donnell to Captain M. Joseph Sheehan, 1 August 1972. App. at 172, 173.

[30] Petitioner's statement in this regard is self-contradicting:

> *The complete and full authority* given to the Northeast merger representatives by the NE MEC *was limited* by the instructions to these representatives to employ a particular method in compiling the integrated list. (Emphasis added.)

App. at 21. Obviously the representatives were either given "complete and full authority" as required by ALPA procedure, in which event any countermanding instruction would be ineffective, or the MEC attempted to limit their representatives' authority contrary to express ALPA policy concerning the particular method to be used in compiling the list. In either event the limiting instruction would have no effect.

[31] SECTION XII, *III*(a) (emphasis added).

the MEC's to limit their representatives' authority, it also provided in this case for the *use of Method* #2 in the compilation of the merged list, thus rendering nugatory petitioner's effort to instruct its representatives to use Method #1.

Outland v. *CAB*,[32] involving the merger between Delta Airlines and C & S Air Lines, arose out of a factual context nearly identical to the case at bar.[33] The complaining pilots' petition before the Board was dismissed, the Board refusing to disturb the negotiated result absent a failure to negotiate or a claim of bad faith. On direct appeal we affirmed:

> [T]he Board would be placed in the position of dealing with issues not directly within its competence if it undertook to resolve conflicting claims on the interpretation of procedures established by collective bargaining agreements. The Board's experience and expertise is with transportation not labor relations problems.[34]

That reasoning is equally appropriate to the facts before us.

Finally, petitioner argues that its members voted to repudiate the final agreement and should therefore not be bound by its terms. Petitioner attempts to find support in *Outland, supra,* where we noted that the integrated seniority list was approved by the merging carriers' respective MEC's. However, MEC approval *vel*

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[32] 109 U.S. App. D.C. 90, 284 F.2d 224 (1960).

[33] The Board had approved the merger in the *Delta-Chicago and Southern Merger Case*, 16 C.A.B. 647 (1952), subject to the same labor protective provisions which we consider today. ALPA policy and procedure had been followed in the same manner as in the case at bar with the exception that, as we note earlier, the respective MEC's had approved the integrated list.

[34] 109 U.S. App. D.C. at 94, 284 F.2d at 228. *But see Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127, 1132 (6th Cir. 1973) (dictum).

non was not necessary to our determination of the issue in *Outland*. Additionally, as we indicate above, the ALPA policy in effect during the negotiations at issue in this case did not require (nor provide for) such MEC approval; the merger representatives were vested with complete and full authority. Moreover, ALPA, not the MEC (merely an administrative arm of ALPA), was the sole bargaining agent for the pilots. Only ALPA was authorized to negotiate a bargaining agreement with the suriviving carrier.

In sum, we conclude that petitioner has failed to demonstrate any irregularity in the ALPA procedures followed below which would justify a conclusion that the final integrated seniority list was not compiled in a fair and equitable manner. We turn now to a consideration of petitioner's charges that the list is substantively defective.

IV. The "Fair and Equitable" Integrated Seniority List

By its order of 24 April 1972 the Board ordered that provision be made for the integration of existing seniority lists "in a fair and equitable *manner* . . . ."[35] The problems of compiling a seniority list for any given employee population are compounded when two previously established lists must then be integrated. Petitioner's desire to rely heavily on length of service is shortsighted in view of the many other significant factors contributing to the fair and equitable integration of any seniority list.[36]

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[35] *See* note 3 *supra* (emphasis added).

[36] "The contention that length of service should control or even that it should always be the dominant factor in seniority is not consistent with experience nor with judicial attitudes toward the subject. . . . Seniority is a matter of negotiation in the first instance and when confronted with the problem, the courts have

In addition to length of service or age, experience, especially among airline pilots, is vitally important. Not only does equipment vary in size and technical sophistication from airline to airline, so do route structures. Five years' experience on one airline may be the equivalent, for example, of only three years' on an airline with larger and more complicated equipment or different route structures. Furthermore, Northeast was a failing airline, and its personnel being absorbed by the surviving carrier could naturally be expected to adapt to the Delta scheme rather than require Delta to rearrange its operations to accommodate the new pilots.[37] Other important considerations include past hiring practices and relative prospects for continued employment and advancement at Delta and Northeast absent the merger.

The mention of Northeast being a failing airline emphasizes the significance (and wisdom) of this integrated seniority list being produced by *negotiation*. Obviously, if Northeast had been allowed to fail and cease operations, its pilots would largely have been reemployed by other aidlines taking over Northeast routes. The northeast pilots reeemployed, however, would not have joined another airline carrying their total seniority from Northeast. The former Northeast pilots may not necessarily have gone to the bottom of their new airline seniority lists, but to the extent each achieved a position higher on the ladder, it would have been as a result of individual negotiation.

And so here, to the extent any former Northeast pilot was ranked higher on Delta's integrated list than pre-

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recognized that factors other than time in service are also important. *No general rules can or need be laid down.*" 109 U.S. App. D.C. at 94, 284 F.2d at 228 (emphasis added, citations omitted).

[37] It is significant in this regard to note that Delta pilots outnumbered Northeast pilots four to one. Petitioner's Brief at 5, n. 1.

viously employed Delta pilots, those Delta pilots were dropped a notch in seniority to make room for the Northeast pilots. Hence, negotiation among those most directly affected, by those most knowledgeable of respective pilot qualifications, was a proper way to compile the integrated list. Petitioner itself has recognized in another context the complexity of the problem with which the Board was faced in arriving at an equitable result.[38] We likewise are impressed that the problem has no facile solution and, accordingly, defer to the negotiated result.

V. Conclusion

Section 408 of the Federal Aviation Act of 1958[39] vests the Civil Aeronautics Board with jurisdiction to hear and approve mergers between air carriers. Our jurisdiction to review the Board's order is limited.[40] On the record before us, however, we find the Board's action in refusing to look behind the freely negotiated list to be wholly consistent with its obligations under the Act. Finding no reason to upset the Board's order, it is accordingly

Affirmed.

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[38] *See* MEC NEWSLETTER, North east (20 May 1970). App. at 89, 91-92.

[39] 49 U.S.C. § 1378.

[40] 49 U.S.C. § 1486(e) provides:

> The findings of facts by the Board of Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Appendix A

Section XII

Mergers, Interchange Protective Provisions

Merger Policy and Procedures

I—Notice of Merger

(a) When, in the opinion of the President of the Association, a merger or consolidation of air lines or parts thereof appears imminent, it will be his responsibility to notify the Master Executive Council of each affected air line that, in accordance with Association procedure, it is their responsibility as representatives of the affected flight deck operating crew members to meet and activate the Association procedures for settling their seniority merger problems.

(b) The President will cause a ballot to be circulated among the flight deck operating crew members of the Association on the current seniority lists of the affected air lines, offering a choice between:

Method #1—Compilation of a merged list solely on the basis of length of service as a flight deck operating crew member without disturbing any individual's relative position on his seniority list.

Method #2—Compilation of a merged list on the basis of problems and factors peculiar to the merger, using length of service as a primary guide or reference point without disturbing any individual's relative position on his seniority list.

(c) In tabulating the results, a majority of the votes cast for either Method #1 or Method #2 shall govern for the respective air lines.

(d) In mergers involving air lines whose pilots have elected dissimilar methods of integration, the compilation of an integrated seniority list shall be accomplished in accordance with the principles outlined in Method #2.

II—Computation of Length of Service

(a) The Master Executive Council of each of the affected air lines will, prior to the date of Government approval, appoint a committee to investigate and compute the cumulative length of service of each flight deck operating crew member on its current seniority list, utilizing all available records. These findings will be compiled and held in abeyance until date of Government approval, at which time the committee will immediately forward on an appropriate Home Office form by registered or certified mail, to each flight deck operating crew member individually, a statement of their findings and request confirmation of the length of service they have accredited to the individual flight operating crew member.

(b) The computation of such length of service shall be based solely on the date a flight deck operating crew member was hired for the purpose of eventually performing the duties of a pilot, as substantiated by company payroll records and other records. Periods of service other than as a flight deck operating crew member shall not be considered in the computation of length of service. Furlough time shall not be credited in the computation of length of service, except that for the purpose of this section, furlough time directly resulting from labor disputes shall not be deducted. Furlough time may be credited in the computation of length of service in whole or in part if mutually agreed upon by the duly authorized merger representatives.

(c) It will be the responsibility of the individual flight deck operating crew member to challenge and to prove his protest by a written statement of fact and relevant evidence within 30 days after the length of service statement is mailed.

(d) The committee will receive and evaluate the protests and will adjudge the validity of the claims. Its decision will be final.

III—Compilation of a Merged List

(a) Within ten days from the date of Government approval of the merger, the Master Executive Councils of the affected air lines shall meet and elect two representatives from their respective seniority lists. The Master Executive Councils will certify these representatives as having complete and full authority to act for and in behalf of the flight deck operating crew members of their respective air line for the purpose of compiling a single flight deck operating crew member seniority list.

(b) Each committee will at this time submit its seniority list with the length of service computations to the duly authorized merger representatives for use in compiling an integrated list. If the respective merger representatives, after reviewing the length of service credit for each affected air line group, disagree as to the computation of the length of service credit, they shall be empowered to compromise their differences to the extent necessary to reach agreement, except that the relative position of the flight deck operating crew members on their respective seniority lists will be maintained. Failing this, the disagreement shall be resolved by utilizing the mediation or arbitration procedures which follow, regardless of the method by which the lists are finally integrated.

(c) The merger representatives of the affected air lines shall meet at the Home Office within thirty days from the said date of the Government approval and by direct negotiation reconcile all their differences as to method of integration and compile the single acceptable flight deck operating crew member seniority list. The representatives shall report at least every five days to the President of the Association on their progress in direct negotiation. If, at any time after receiving the first report, in the opinion of the President, satisfactory prog-

ress is not being made, he shall uilaterally intervene and invoke mediation.

(d) The Mediator shall be the President of the Association or an appointee of the President of the Association. Said appointee may be an Association officer, or Home Office staff member who has been relieved of all other Association duty during mediation sessions.

IV—Arbitration

(a) If within seventy-five days from the said date of Government approval, negotiations and mediation have not resulted in an integrated flight deck operating crew member seniority list, arbitration shall be mandatory, and such arbitration, except as specifically provided herein, shall be conducted in accordance with the Arbitration Act of the State of Illinois as amended.

(b) The Executive Committee shall select and maintain a curret master list comprised of 50 Association members who have consented to serve as members of a seniority integration Arbitration Board.

(c) The Arbitration Board shall be composed of three persons, two of whom shall be Association members selected from a master list by the merger representatives. Failing to agree on such two Association members of the Arbitration Board within 80 days from date of Government approval, the merger representatives will elect these members by alternately striking a name from the master list until two are left.

(d) The third member of the Arbitraton Board shall be selected by mutual agreement of the representatives, or if unable to agree within 80 days from said date of Government approval, the President of the Association will invoke the services of the National Mediation Board to designate such third Board member.

(e) The Arbitration Board shall convene at the Home Office not later than 105 days from the said date of Government approval of the merger except that the President of the Association may, at his discretion, extend this time limit an additional fifteen days.

(f) The respective pilot Mastern Executive Councils from the affected air lines shall be charged with the presentations of their contentions regarding the merger and integration of the pilot seniority lists before the Arbitration Board, and shall present such contentions by oral or written evidence as they shall deem advisable.

(g) Only members of the Arbitration Board shall participate in executive sessions of the Arbitration Board. A majority vote will decide the issues and the decisions shall be made and written in an executive session of the Arbitration Board.

(h) The decision shall be issued not later than 60 days after convening of this Board and shall be final and binding on all parties to this arbitration proceeding.

V—Implementation

(a) Concurrent with merger procedures, the Master Executive Councils shall each appoint two members to a joint negotiating committee. The Master Chairmen of the respective air lines shall be ex-officio members of such committee.

(b) The President shall closely monitor preparation of the opening letter and all attendant problem areas and shall, if necessary, appoint a Chairman of the joint negotiating committee.

(c) In the event unresolved opening issues remain, the President of the Association will call a meeting of the joint negotiating committee within thirty days following the receipt by the Association of a completed seniority list for the purpose of resolving these issues.

(d) Where a duplication of Councils exists, the Executive Committee shall conduct a special Local Executive Council election within thirty (30) days after the signing of the merged working agreement. The Council identity of the combined Local Councils shall be the lowest designated number of the former Councils.

(e) Within forty-five days following the completion of the agreement, the President of the Association shall call an MEC meeting for the purpose of electing MEC officers. The President or his designee shall conduct such meeting and election.

APPENDIX B

Order 73-1-24

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 10th day of January, 1973

DELTA-NORTHEAST
MERGER CASE

Docket 23315

ORDER

By Orders 72-5-73/74, served May 19, 1972, the Board approved the merger of Delta Air Lines and Northeast Airlines, Inc., subject to the Allegheny-Mohawk type labor protective provisions (see Orders 72-4-31/32) with certain modifications not here relevant. Section 3 of those provisions reads as follows:

> "Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13."

Section 13 of the provisions provides for the arbitration of any dispute or controversy that arises with respect to the labor protective conditions. The Board also, in accordance with its customary practice, reserved jurisdiction "to make such amendments, modifications, and additions to the labor protective conditions . . . as circumstances may require." In reliance on this reserved jurisdiction and on the requirements of section 3 of the labor protective conditions, a peti-

tion for relief has been filed by the Northeast Master Executive Council ("Northeast MEC").

The issue raised by the petition concerns the integrated seniority list of flight deck officers adopted by Delta upon the merger into it of Northeast.[1] That list, in turn, was presented to Delta by the Air Line Pilots Association (ALPA), which is the collective bargaining representative of the Delta flight deck officers (including those formerly employed by Northeast) and until ALPA's collective bargaining agreement with Northeast expired by reason of the merger was the representative of Northeast's flight deck officers as well. Delta accepted ALPA's list intact. Thus while the Northeast MEC[2] is asking us to act pursuant to the conditions we imposed on Delta in connection with our approval of the merger, the Northeast MEC's concern is with the way ALPA arrived at the integrated seniority list.

The facts regarding that procedure are not disputed. In contemplation of the merger of Delta and Northeast, and while ALPA was the designated collective bargaining agent of both the Delta and Northeast flight deck officers, ALPA set in motion its own established procedures that are designed to accomplish the integration of merging carriers' seniority lists. ALPA's rules provide for two alternative methods of integrating the flight deck officer seniority lists of merging airlines: Method (1) looks to length of service only; method (2) provides for integration of the seniority lists "on the basis of problems and factors peculiar to the merger, using length of service as a primary guide or reference point . . . ."

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[1] The merger was consummated on August 1, 1972.

[2] ALPA's constitution and by-laws establish a "Master Executive Council" as the administrative arm of ALPA at each airline whose flight deck officers are represented by ALPA. Each ALPA flight deck officer group elects its own MEC, on an airline-by-airline basis.

In accordance with ALPA's rules, the Delta and Northeast flight deck officers voted on which of the two seniority list integration methods they preferred. The Delta flight deck officers chose Method (2). Northeast's officers chose Method (1). Under ALPA rules, in that circumstance method (2) governs. [3]

ALPA's rules also provide that each merging carrier's flight deck officers are to elect representatives to conduct the seniority list negotiations. That was done. The Northeast MEC thereupon instructed its representatives to insist on the use of Method (1) in integrating the seniority lists, notwithstanding the ALPA rule that provided otherwise.

The representatives of the Delta and Northeast flight deck officers began meeting late in the summer of 1971. By June 1972 they had agreed on an integrated seniority list, arrived at through the use of Method (2)—*i.e.*, the method rejected by the Northeast MEC but specified by ALPA rules. (The particular "problems and factors peculiar to the merger" that the negotiators considered are not specified in the pleadings. But it has long been recognized that matters relating to the probable impact of a merger on the relative job opportunities of the employees of the merging carriers are relevant to seniority list integration questions. Thus, for instance, the negotiators here could have taken into consideration the relative prospects for continued employment and advancement at Delta and Northeast absent a merger.) [4]

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[3] The ALPA Policy Manual provides that "In mergers involving airlines whose pilots have elected dissimilar methods of integration, the compilation of an integrated seniority list shall be in accordance with the principles outlined in Method # 2."

[4] See, *e.g.*, North Atlantic Route Transfer Case, 12 C.A.B. 124, 133 (1950). Other factors that could be considered include differences in size of equipment utilized by the merging carriers, differences in route structure and imbalances in the number of pilots hired in any particular year: ALPA Merger Policy Working Committee, Report to the ALPA 1970 Biennial Convention.

The integrated seniority list was made public on June 19. In accordance with its formalized procedures, ALPA transmitted the list to Delta, which, as noted earlier, accepted the list intact. (That list is now part of the Delta-ALPA collective bargaining agreement.) In the meantime, the Northeast MEC met and determined to repudiate the list on the ground that the list would result in a loss of seniority for the Northeast pilots relative to the Delta pilots. The Northeast MEC also expressed concern about certain restrictions on Northeast pilots to which its merger representatives had agreed.

Subsequent efforts to have ALPA repudiate the list were unsuccessful. For example, ALPA's president, in rejecting the Northeast MEC's plea to overturn the negotiated list, advised the Northeast MEC that "it appears the method used in both balloting the membership and in compiling the seniority list was much the same as that used in several other mergers in ALPA's recent history." Thereafter the Northeast MEC sought to have the implementation of the seniority list enjoined. The suit was dismissed. [5]

The Northeast MEC's petition to the Board asks us to void the seniority list and order that the seniority list question be submitted to final and binding arbitration. Petitioner alleges that the merger representatives of the Northeast pilots exceeded the authority they were given by the Northeast MEC in that the merger representatives should have accepted only an integrated seniority list based on date of hire, or length of service, or both those factors (but no others). Petitioner further submits that by agreeing to a list based on "problems and factors peculiar to the merger," its own representatives accepted a seniority list that is unfair and inequitable to the Northeast pilots.

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[5] Civil Action No. 1911-72 (D.D.C.).

Answers to the petition have been filed by the Delta pilots, Delta Air Lines and ALPA.[6] All three oppose the petition and request that it be dismissed. The argue that the negotiations that led to the formulation of the integrated seniority list were conducted in good faith and pursuant to the applicable ALPA procedures; that ALPA procedures provide that under the facts of the Delta-Northeast merger, the basis of the integrated seniority list should be length of service qualified to take into account "problems and factors peculiar to the merger," rather than strict date of hire and/or length of service; that the negotiations and resultant seniority list are in conformity with the Board's order approving the merger; that the duly appointed merger representatives of both pilot groups agreed to the negotiated list; and that, in any event, the seniority list is fair and equitable.

We have concluded that the facts as presented in the pleadings before us do not warrant the exercise of our retained jurisdiction, and that accordingly the petition should be dismissed.

At the outset we note that the integration of seniority lists based on factors other than, or in addition to, date of hire or length of service is by no means uncommon: See, *e.g.*, *Delta-C&S Seniority List*, 29 C.A.B. 1347 (1959), aff'd. *sub nom. Outland* v. *CAB.*, 284 F.2d 224 (C.A.D.C. 1960).[7] Nor can we conclude that the use of factors in addition to date of hire or length of service is so unfair as to require that we adopt a general rule forbidding carriers from accepting seniority lists formulated on the basis of such addi-

[6] ALPA filed a Motion for Leave to File an Unauthorized Document with its answer attached. Since the Chief Administrative Law Judge extended the time for filing answers to the petition, ALPA's answer was timely filed and its motion is moot.

[7] The Delta MEC's Answer to the Northeast MEC petition (at pp. 19-29) lists the many airline mergers in which factors other than length of service were used in integrating seniority lists.

tional factors. See, *e.g.*, *North Atlantic Route Transfer Case, supra.*[8]

In any event, the facts here are that representatives selected by the two airline flight deck employee groups met, negotiated an integrated seniority list pursuant to the specified procedures of the employees' collective bargaining representative, and gained its acceptance by the surviving carrier. No bad faith on anyone's part is alleged, much less proven. Little more than a year ago we declined to intervene in a similar dispute arising out of the *Universal-American Flyers Acquisition Case* (Order 71-9-24). We shall do so here as well. In the *United-Capital Merger Case*, Order E-20740 (April 24, 1964) the carrier, as here, had adopted the integrated seniority list put forth by ALPA which represented both the United and Capital flight deck employees. In denying a petition to set aside the seniority list we held that the carrier should not be called upon to challenge the established procedures of the designated collective bargaining agent of the employees, and that it was not improper for the carrier to assume a posture of neutrality in the intra-union controversy and agree with the union to accept the integrated list that had been arrived at under applicable union procedures. And on similar facts in *Universal-American Flyers* case, *supra*, we noted that the "substantive import of the petitioners' complaint is that they have been unfairly represented in the seniority list negotiations by ALPA, their authorized bargaining representative, not that a settlement of the integration of the Universal-American Flyers seniority list has failed to conform to the procedures contemplated under section 3 of the Board's labor protective provisions."[9] In sum, it has been,

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[8] Nothing herein should be construed as suggesting that the Board would have found that the adoption by Delta of a list formulated pursuant to ALPA's Method (1) in accordance with ALPA rules would have raised any problems under section 3 of the Board's labor protective conditions.

[9] Order 71-9-24 at 4.

and continues to be, our view that absent a showing of bad faith, the adoption by a carrier of an integrated seniority list proposed by the collective bargaining representatives of the employees involved amounts to the carrier having made "provisions . . . for the integration of seniority lists in a fair and equitable manner" within the meaning of section 3 of the Board's labor protective provisions. To hold otherwise would mean that the Board would be passing on matters of internal union procedure, and that carriers and airline unions could not rely on the validity of seniority lists put forth by designated employee representatives for purposes of collective bargaining. That state of affairs would not be in the public interest: See Order 71-9-24, at 5; *Delta-C&S Seniority List*, 29 C.A.B. 1347 (1959).

As we have reiterated in past cases of a similar nature,[10] we do not intend that our dismissal of the dissatisfied employees' petition should abridge their rights to pursue such other remedies as may be available to them.

ACCORDINGLY, IT IS ORDERED: That the petition of the Northeast Master Executive Council for Exercise of Reserved Jurisdiction be and it hereby is dismissed.

By the Civil Aeronautics Board:

HARRY J. ZINK
Secretary

(SEAL)

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[10] Delta-C&S Seniority List, 29 C.A.B. 1347, 1350-1351; Order 71-9-24, *supra*, at 6.